United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2064

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA ex rel :
JOSEPH A. MERCOGLIANO,
:
Petitioner-Appellant
:
- against -
:
COUNTY COURT OF NASSAU COUNTY,
:
Respondent-Appellee

- -x

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DOCKET NO. 76-2064

REPLY BRIEF FOR PETITIONER-APPELLANT

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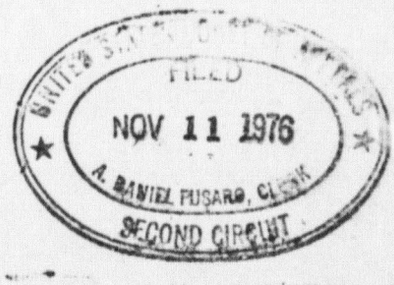

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POINT ONE

IT IS IRRATIONAL TO ASSUME THAT THE PETITIONER KNEW THAT HIS PREDICATE CONVICTION WAS CONSIDERED MORE SERIOUS IN TEXAS THAN IN NEW YORK

Both the court below and the respondent conclude that the rational basis for imposing second-felony treatment upon those like the petitioner, whose previous offenses would not be felonies in New York, is the concept that it is the

> violation of an important prevailing norm in [another] jurisdiction that identifies the serious criminal offender and calls for an extended term. Brief for respondent-appellant, p. 9.

The District Court articulated this concept as follows:

> We cannot say that it is irrational to consider that a Texas offender is a more serious offender than a similar offender in New York, <u>for the simple reason that he was told that Texas considers that his crime is serious</u>, but he nevertheless committed that crime against the State of Texas. The Texas offender has in effect demonstrated that he is not concerned about behaving in accordance with the norms important to the society in which he is present, and that factor sets him apart from the possessor of marijuana in New York who has demonstrated no comparable lack of concern. Opinion of the District Court, p. 5 [emphasis supplied].

As demonstrated by the underlined language quoted above, this rationale is premised squarely on an assumption that the foreign offender in fact <u>knows</u> that he is violating a <u>serious</u> societal norm, i.e., that he knows that the jurisdiction in which he commits the offense has established

a potential penalty of more than one year. It is the supposed fact that the offender in Texas knows that his offense is considered serious, in contrast to his counterpart in New York, and thereafter knowingly violates it, that allegedly sets him apart as a more serious offender.

However, it is irrational to assume that the petitioner or those who have committed similar offenses knew or reasonably should have known that Texas considered marijuana possession to be an especially serious offense. Absent actual knowledge by the petitioner that Texas considered his prior offense to be particularly serious, there is nothing to distinguish him from a New York offender who has committed the same prior offense, and there is nothing to justify a harsher sentence.

The assumption that a foreign offender knows how serious his offense is considered in the foreign jurisdiction cannot be justified by analogy to the rule of law that ignorance of the law is not a defense. In a prosecution of an offender by any particular jurisdiction, neither ignorance of the proscribed act nor of the penalty is ordinarily a defense. Perkins, Criminal Law (2nd Edition, 1969) at 920. This rule is commonly, but erroneiously, stated as a presumption: "Every

person is presumed to know the law." Weeks v. State, 24 Ala. App. 198, 199 (1931). However, this rule is not a true presumption because it does not purport to reflect the actual state of mind of criminal defendants. Rather, it is a rule which makes one's knowledge of the law an irrelevant consideration in most prosecutions. See New York Penal Law §15.20(2). The purpose of the rule is to permit enforcement of the criminal law. Without it the state would have a virtually insurmountable burden to convict anyone of violations of the criminal law. Accordingly, Texas has already employed this rule to enforce its marijuana statute against the petitioner. But the rule has no relevance to the purposes served by New York's second-felony statute -- to deter, penalize, and islolate those who persist in the commission of serious offenses. When New York proposes to sentence a second offender more harshly simply because his prior offense occurred in another state, it must justify this unequal treatment by an actual difference in culpability between otherwise

similar offenders. Logically, it cannot presume the existence of a difference in culpability by resort to the rule of the law that one is "presumed" to know the law unless there is a genuine factual basis for this presumption. In short, it would constitute argument by false analogy to apply this rule of law in the context of the instant equal protection challenge.

The assumption that a foreign offender knows that his offense is considered to be an expecially serious offense in the foreign jurisdiction is without factual or rational basis. Neither the petitioner nor other similar offenders who commit offenses, which are deemed felonious in only certain jurisdictions, can rationally be expected to know that they are transgressing an "important prevailing norm," instead of merely a less important norm.

A study conducted by the California State Assembly in 1968 concluded that the public is extremely ignorant about the legal sanction for various crimes. By far the majority of the public underestimate the severity of existing penalties. When questioned about recent legislative changes to increase penalties for certain crimes, about one half of the respondents in the survey could not even guess whether the penalties had been changed or in what direction. "In short the general

public simply does not know what the penalties are for various crimes." Progress Report by the Interim Committee on Criminal Procedure, Assembly of the California State Legislature, at page 17 (catalogue No. S364.609794 of the New York State Library, Albany, New York). The California study questioned residents of California. For those who are simply visiting another state -- a common occurrence in our mobile society -- it would be the rare person indeed who would know the penalties which that state imposes.

If the public is largely ignorant of the existing penalties for the common serious crimes, it is to be expected that they would be even more ignorant of the seriousness of offenses such as the petitioner's marijuana conviction in Texas. By the very nature of the equal protection question at issue, the offenses which, if classified as predicate felonies in New York, will permit an equal protection claim, are offenses in a "gray area," because they are offenses over which the states are divided as to their appropriate classification. When states, such as New York and Texas, differ over whether possession of two marijuana cigarettes should be classified as felonious, can New York rationally assume that the offender in Texas <u>knew</u> how serious Texas considered the offense? It is especially apparent in the instant case that no such assumption is possible when Texas itself in 1973 changed its classification of possession of not more than two ounces of marijuana from a felony to a class B misdemeanor (Vernon's Annotated Revised

Civil Statutes of Texas, Art. 4476-15, Sec. 4.05); all but two states, as of October 1973, classified the first offense of possession of a small amount of marijuana as a misdemeanor (Soler, Of Cannabis and the Courts, 6 Conn. Law Rev. 601, 716-718, citing a study made by the National Organization for the Reform of Marijuana Laws); and at least two states have decriminalized possession of small amounts of marijuana [1976 session laws of Minnesota, Ch. 42, Sec. 2(5); Oregon Revised Statutes 161.515, 161.565, 167.207(3)].

An assumption that is factually erroneous may not be employed to justify a penal law challenged on equal protection grounds. There must be some showing by the state that "the distinctions drawn have some basis in practical experience." South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court found the Oklahoma eugenics statute unconstitutional because it allowed sterilization of those who commit multiple larcenies but did not permit it for those who commit multiple embezzlements. "There [was] no basis to infer that the inheritability of criminal traits follows the legal distinctions between grand larceny and embezzlement." Id., at 542. Likewise, there is no basis to infer that the petitioner acted with a mental state different from or more culpable than the mental state of those who have committed identical prior offenses in New York State. At the very least, in order to sentence those like the petitioner as second-felony offenders, New York would have to hold a hearing to substantiate the defendant's presumed knowledge of the foreign jurisdiction law.

Absent any rational assumption that the petitioner knew that his Texas offense was considered serious, the only possible justification for a harsher sentence would be a claim that the petitioner ought to have known the seriousness of the Texas offense. In effect this is a claim that the petitioner is more culpable than his New York counterpart because of his failure to examine the statutes of Texas. It is submitted that this failure does not mark the petitioner as sufficiently more culpable to justify imposing a second-felony sentence. While Texas does have an interest to insure that those present in it are aware of and abide by its penal statutes -- an interest already served by the petitioner's sentence in Texas -- penalizing a New York offender for his failure to examine the Texas statutes simply does not serve any legitimate interest of New York. To impose a substantial additional penalty for this reason is rationally related to none of the purposes of the New York Second-felony statute -- to deter, penalize, and isolate those who persist in committing serious offenses. The statute as it applies to those like the petitioner, therefore, does not satisfy the guarantee of equal protection of the laws.

POINT TWO

BECAUSE THE PETITIONER'S PERSONAL LIBERTY IS AT STAKE, THIS COURT SHOULD APPLY THE COMPELLING STATE INTEREST TEST IN DECIDING HIS EQUAL PROTECTION CLAIM.

The respondent argues that "there is no fundamental right or interest to liberty after conviction for a serious crime, particularly here where petitioner was at the least eligible for a term of imprisonment as a first felony offender. It is for this reason that penal classifications have been uniformly subjected to a rational basis test." (respondent's brief, p. 7). The petitioner disagrees on three grounds.

First, the respondent erroneously suggests that the petitioner's interest at stake, since he has been convicted of a "serious crime," is merely whether he will receive a greater or lesser term of imprisonment, i.e. a matter of degree. However, the real interest at stake is the difference between eligibility for probation as a first felony offender (CPL 65.00)--i.e. no penal incarceration at all--and a potential three years in prison as a second felony offender. Nor does the fact that a defendant has been convicted of a crime and will probably have to serve at least some time in prison mean that his personal liberty is no longer at stake. In Mullaney v. Wilbur, 421 U.S. 684 (1974), the Court held that personal liberty was sufficiently at stake to trigger the constitutional guarantee of due

process of law even where the defendant would at least be guilty of manslaughter (instead of murder).

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder [mandatory life sentence], as compared with a verdict of manslaughter [maximum of 20 years imprisonment], differ significantly. Id. at 698.

Second, liberty from incarceration is indeed a fundamental right deserving of the utmost protection by the courts. Any presumed agreement by the petitioner, either in the court below or in the appellant's brief to this court, that personal liberty is not a fundamental right is expressly denied. The liberty of a criminal defendant is "an interest of transcending value." In re Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 684, 701 (1974); both cases quoting from Speiser v. Randall, 357 U.S. 513, 526 (1958). It is because liberty is an interest of transcending value that a defendant is entitled to all the protections afforded by due process, including the right to have the prosecution bear a burden of proof beyond a reasonable doubt as to every element of a crime. Mullaney v. Wilbur, supra. Unlike some recognized fundamental rights which have been found protected by the Constitution by implication (e.g. right of privacy, Griswold v. Connecticut, 381 U.S. 484), the right of personal liberty is specifically protected by the Constitution in the

Fifth and Fourteenth Amendments and in the habeas corpus clause of Art. One (Art. 1, §9, cl. 2).

In United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1971), the Court of Appeals for the District of Columbia squarely held that personal liberty is a fundamental right that triggers application of the "compelling state interest test." In Thompson the question was whether Congress could without violating the guarantee of equal protection impose more stringent requirements on those applying for bail pending appeal in the District of Columbia than on those who have been convicted of identical crimes outside the District of Columbia. The court held that

> where fundamental personal liberties are involved, the political process may not operate quickly or effectively enough to prevent victimization of a helpless minority...[1] Where a classification impinges on constitutional rights, the court's duty is clear, and such a classification is not permitted unless the legislature succeeds in demonstrating a "compelling interest."
>
> Although the right asserted is not explicitly mentioned in the constitution, the courts will still "closely scrutinize" a classification limiting its exercise so long as fundamental personal freedoms are

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[1]The New York State legislature acted to correct the second felony offender statute to meet the constitutional challenge raised herein after the petitioner's conviction. New York State L. 1975, c. 784.

> at stake. [citations omitted] The courts have been particularly careful to inspect classifications relating to the criminal process, even in cases where it could not possibly be contended that constitutional rights are involved. [citations omitted] The rights of a criminal defendant are in some sense the most basic of all, since what is at stake is no less than the freedom to be free.
>
> ...[T]he right to bail is "fundamental" in that it involves issues of personal freedom in the most immediate and literal sense of those words. Id. at 1340.

Accord: United States v. Brown, 483 F.2d 1314, 1318 (D.C. Cir. 1973) (the liberty at stake in bail pending appeal is fundamental); Bell v. Hongisto, 346 F.Supp. 1392 (N.D. Cal. 1972) (bail pending appeal); Palmore v. Superior Court of the District of Columbia, 515 F.2d 1294 (D.C. Cir. 1975) (the right to resort to habeas corpus relief may be fundamental).

That freedom from incarceration is fundamental is perhaps most obvious in that it incorporates many other well recognized fundamental rights. When the state incarcerates a criminal defendant it most assuredly revokes his fundamental freedom to walk about, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 686 (D. Mass. 1973); to travel between states, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); to associate freely with persons of one's own choice, Kusper v. Pontikes, 414 U.S.

51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963); to retain one's privacy, Roe v. Wade, 410 U.S. 113, 152-53 (1973); to choose and maintain one's family relationships, Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); and "to be let alone", a right which Mr. Justice Brandeis termed "the most comprehensive of rights and the right most valued by civilized men". Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

Finally, the cases cited by the respondent at pages 7 and 8 of his brief do not support his contention that personal liberty is not a fundamental right. Marshall v. United States, 414 U.S. 417 (1974), while similar to the New York second felony offender law in that it disqualifies from consideration for rehabilitative treatment those with two prior felony convictions, does not discuss the right to freedom from incarceration. The right at stake in Marshall, which the Court finds not to be fundamental is the right to "rehabilitation from narcotics addiction at public expense after conviction of a crime." Id. at 421. In Johnson v. Louisiana, 406 U.S. 356, 363 (1972), the interest at issue was the right of a defendant to be convicted only by a unanimous jury. In Baxstrom v. Harold, 383 U.S. 107 (1966) the Court does not discuss the appropriate standard by which to judge

a state procedure by which an inmate who reaches the maximum expiration of his sentence may be committed to a mental hospital. Rather, it held that the procedure involved lacked even a rational basis. In United States v. Russell, 285 F.Supp. 765 (E.D. Penna. 1968) there was no discussion of the appropriate standard to be applied and that case simply held that a defendant had no right at an extradition hearing--fundamental or otherwise--to have counsel appointed.

While McGinnis v. Royster, 410 U.S. 263 (1973), a case involving eligibility to be considered for parole release, does apply the rational basis test, it is to be noted that the issue of the proper test to be applied was not litigated, since it was conceded by the petitioner-appellant that the rational basis test should be applied. McGinnis v. Royster, supra, at 270. Likewise, in Duffy v. Wells, 201 F.2d 503 (9th Cir. 1953) the court applied the rational basis test without any discussion of the issue of the appropriate test.

Whatever test is applied, be it rational basis or strict scrutiny, it is clear that the claim of administrative and judicial burden in evaluating foreign convictions against New York definitions cannot sustain the statute. (respondent's brief, p. 12) In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court held that a state's understandable

desire to eliminate the necessity of holding hearings to select an administrator for an intestate estate, where there are two equally entitled candidates for that office, would not even satisfy the rational basis test. Likewise, in Frontiero v. Richardson, 411 U.S. 677 (1973), the Court held that "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" Id. at 690.

POINT THREE

THE COURT SHOULD NOT ABSTAIN FROM DECIDING THIS CASE

The respondent argues in a footnote at page six of his brief that this court should abstain from deciding this appeal pending determination by the New York State Court of Appeals of People v. Parker, 49 A.D.2d 657, _____N.Y.2d_____, citing Bellotti v. Baird, _____U.S._____, 96 S. Ct. 2857, 49 L.Ed.2d 844 (1976). The abstention doctrine is inapplicable to the instant case.

The Supreme Court held in Bellotti, supra, a case challenging the Massachusetts statute regarding parental consent to abortions performed on minors, that

> abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' 49 L.Ed.2d 844, 855.

Thus in Bellotti the issue was whether there was a construction of the statute which might remove any constitutional challenge. That is not the situation here. There has never been nor can there be a claim that the statute is unclear or that it could be construed to render it constitutional. The meaning of the statute is beyond dispute, and the only question remaining is whether the statute is constitutional.

Furthermore, abstension is not a doctrine which is applicable to a petitioner in federal court for a writ of habeas corpus. The requirement of exhaustion of state remedies

[28 U.S.C. §2254(b)] adequately permits the state an opportunity both to construe the meaning of the statute and to rule on its constitutionality. Once a state court has ruled on a petitioner's constitutional claim, his liberty should not thereafter be dependent on the outcome of an unrelated case over which he has no control.

Finally, it should be noted that the defendant in People v. Parker, supra, does not and cannot raise the constitutional claim raised herein, since Parker's previous conviction was one which would also be a felony in New York State, and Parker can therefore raise no claim of denial of equal protection of the laws.

CONCLUSION

FOR THE ABOVE REASONS THE ORDER OF
THE DISTRICT COURT SHOULD BE REVERSED

Respectfully submitted,

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